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PROJECT NO. 53140

REVIEW OF TEXAS UNIVERSAL SERVICE FUND	§ § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

TEXAS TELEPHONE ASSOCIATION'S REPLY COMMENTS

The Texas Telephone Association ("TTA") respectfully submits these reply comments as requested on March 11, 2022, by the Public Utility Commission of Texas ("Commission" or "PUCT") regarding the review of Texas Universal Service Fund ("TUSF") pursuant to Senate Bill ("SB") 586 (2017). TTA appreciates the opportunity to reply to certain issues raised in the initial comments of DialToneServices, L.P. ("DTS"), AMA Techtel Communications ("AMA"), Texas Cable Association ("TCA"), Office of Public Utility Commission ("OPUC"), Texas Statewide Telephone Cooperative, Inc. ("TSTCI"), and CTIA – The Wireless Association ("CTIA"). In support thereof, TTA respectfully shows as follows:

I. INTRODUCTION

On March 11, 2022, Commission Staff ("Staff") filed its Questions for Comment regarding TUSF. As stated in the filing, the Commission invited interested parties to file reply comments by April 18, 2022. Accordingly, these reply comments are timely filed.

TTA filed initial comments in this proceeding[1] addressing the effectiveness of the process established by SB 586 and its ability to meet the Legislative goals of providing long-term, regulatory-efficient, needs-based TUSF support for the small and rural incumbent local exchange carriers ("ILECs," or here, "small providers"). No commentor here contradicted that the voice service rates alone of small providers cannot cover the costs of building and maintaining a

[1] *Review of Texas Universal Service Fund*, Project No. 53140, Texas Telephone Association's Initial Comments in Response to the Commission Staff's Questions for Comment (Apr. 8, 2022). ("TTA's Comments").

4871-7128-5020, v. 1

statewide network that provides telecommunications service in sparsely populated areas of the state, so TUSF support remains critical to keeping all Texans connected.[2]

As an over-arching comment, in TTA's view, the sole impediment to the complete success of SB 586 is the severe underpayment of TUSF. For example, last week, the Commission gave recipients of high-cost support only a few days' notice that they will be receiving just 15% of the high-cost TUSF support due to them this month (an 85% reduction, the worst so far).[3] In addition, this month certain other TUSF program payments were delayed for the first time in the history of those programs. These recent actions highlight the inconsistency of the Commission's current TUSF policies and practices, since these new delayed payments appear to contradict the artificial payment hierarchy the Commission created without notice in December of 2020 through a contract amendment with Solix, Inc., the TUSF administrator. This is discouraging, and does not reflect a transparent, open government. TTA appreciates the PUCT's difficult job managing TUSF, but such inconsistent policies and payments—each implemented with effectively no notice and no opportunity for stakeholder comment—make it impossible for small providers to plan for long-term, costly investments in rural infrastructure. As noted in TTA's initial comments, TUSF's high-cost programs have been underfunded by at least 70% for a longer period of time than the adjustment mechanisms were properly funded as SB 586 required. TSTCI and others' comments echo that the uncertainty this creates for the providers who rely on TUSF support to serve otherwise uneconomic rural areas are the only reason SB 586 is falling short of its legislative goals. TTA

[2] Maintaining Universal Service in Texas: Recent Legislation, Oversight and Viability of the Texas High-Cost Programs, Michael J. Balhoff and Bradley P. Williams at 7 (March 2021).

[3] Letter from Jay Stone, Solix, Inc. (Apr. 13, 2022). ("Apr. 13, 2022 Solix Letter"). Solix, Inc. sends a monthly memo entitled "Notice of Changes to your Texas Universal Service Fund (TUSF) Support Disbursement" to TUSF recipients since January 7, 2021, informing providers what percentage of their authorized high-cost support they will receive that month, typically around 30%. Small providers have recently received a Solix, Inc. memo stating that the projected April 2022 payout for the February 2022 reimbursements will be 15%.

wishes the TUSF funding process were as structured, consistent, and transparent as the small providers reporting is under SB 586.

II. RESPONSE TO SPECIFIC COMMENTS BY QUESTION

1. **The continued appropriateness of using the FCC prescribed rate of return for the mechanism established under PURA § 56.032(d), if the FCC still prescribes a rate of return that may be used for that mechanism?**

As a general response regarding the use of the Federal Communications Commission's ("FCC") prescribed rate of return as a benchmark for the SB 586 mechanism, TTA notes that while a minority of commentors question whether the FCC rate may be too high in theory, no commenter alleges that the actual returns being produced by the SB 586 process are excessive in practice. SB 586 sets a benchmark range of rates of return to be used in determining the need for an adjustment to either TUSF support or local rates. The purpose of setting a benchmark rate of return is to allow small providers the opportunity to earn a reasonable return. In practice, it does not in any way guarantee a return close to the benchmark. In fact, it is undisputed the vast majority of the small providers which are participating in the SB 586 process are reporting returns well under even the low end of the benchmark range, which is 300 basis points below the FCC-prescribed rate of return (i.e., 6.75%). And when under-earning small providers are permitted to seek increases in TUSF to improve their returns, they can only adjust up to a 6.75% return (if not capped even lower)—small providers are not permitted to request increases up to the FCC-prescribed rate of return. In addition, the few commentors who question the use of the FCC-prescribed rate of return as a benchmark do not acknowledge that the use of a benchmark rate of return mitigates the need for many individual contested cases to set company-specific rates of return, which would be very costly and time consuming, and could result in authorized returns higher than the FCC's rate of return.

TTA believes that the FCC's prescribed rate of return can continue to be used for the review of small provider's earnings. Litigating specific rates of return for each of the 43 small providers participating in the SB 586 regulation would be very costly and ultimately borne by customers in terms of rate case expenses as well as increased returns. For example, Sharyland Utilities, LLC's last rate case settled at a cost to its customers of $2,019,828, just for the utility's rate case expenses.[4] Southwestern Public Service Company's last rate case expense cost customers $2,614,191.[5] Southwestern Electric Power Company's last rate case expense cost customers $1,992,830.[6] In addition to the expense involved, the magnitude of utility and Commission time and resources needed to litigate 43 separate small provider rate cases would overwhelm the regulatory process at the PUCT, and would not guarantee any benefit to the public. A benchmark range of reasonable rates, such as that established by SB 586, is an appropriate way to mitigate such risks.

TCA is the only commenter that directly criticizes the FCC's rate of return, saying the FCC "itself has openly criticized [the rate of return's] validity" and the existing separations rules are outdated and "no longer make sense."[7] TCA's argument seems to be that the process by which intrastate, regulated returns are calculated is flawed, rather than that the use of the FCC benchmark is flawed; TCA alleges that the current FCC separations process misallocates network costs and revenues as internet and other broadband access services and creates cross-subsidization so that

[4] *Application of Sharyland Utilities, LLC for Authority to Change Rates*, Docket No. 51611, Affidavit of Meghan Griffiths at 1 (Jun. 25, 2021).

[5] *Application of Southwestern Public Service Company for Authority to Change Rates*, Docket No. 51802, SPS's Motion to Admit Additional Evidence at 3 (Apr. 4, 2022).

[6] *Application of Southwestern Electric Power Company for Authority to Change Rates*, Docket No. 51415, Proposal for Decision at 320 (Aug. 27, 2021).

[7] *See* Texas Cable Association Initial Comments at 3 (Apr. 8, 2022). ("TCA's Comments").

16 TAC § 26.407(h) proceedings do not reveal an ILEC's "true financial health and need."[8] This argument does not explain why the FCC's prescribed rate of return is an inappropriate benchmark for Texas's small providers, but rather is an attack on the FCC's jurisdictional cost allocation methodology.

Moreover, TCA's arguments include no apparent analysis of the actual rates of return earned by small providers using the FCC benchmark nor what their appropriate rates of return might otherwise be. Had TCA performed such analysis, it would likely show that the reasonable rates of return necessary for small providers to attract capital is actually above 9.75%. For instance, in a recent report to Texas policymakers, noted telecommunications economist Michael J. Balhoff opined that the minimum reasonable rate of return prescribed by Commission rule falls well below the financial industry's expected equity returns for small providers and also below the standards typically required in utility regulation.[9] Mr. Balhoff indicates that an analysis of equity returns expected by investors and using methods required by the U.S. Supreme Court's *Hope* and *Bluefield* analyses, results in equity returns in excess of 13% in 2021, with a corresponding rate of return in excess of 10%.[10] Given the recent increases in the 10-year treasury rate, the same equity returns today would be expected to be even higher. Mr. Balhoff concludes that if the policy for statewide telecommunications service in Texas is to remain effective and sustainable for the long term, capital costs must be covered consistently, predictably, and at market-based financial rates of return.[11]

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[8] *See id.* at 3–4.

[9] Maintaining Universal Service in Texas: Recent Legislation, Oversight and Viability of the Texas High-Cost Programs, Michael J. Balhoff and Bradley P. Williams at 24 (March 2021).

[10] *Id.* at 23-24 (citing *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) & *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 391 (1944)).

[11] *Id.* at 24.

It is also important to remember that small providers—unlike the water and electric utilities whose comparatively lower authorized rates of return were referenced in OPUC's initial comments[12]—are not monopolies. OPUC's comparisons of recent electric and water utilities' authorized returns to the FCC rate of return as a benchmark for telecommunications utilities simply does not compare "apples to apples" given the differences in regulation and the comparative risks and obligations of telecommunication providers. Unlike most water and electric utilities that receive an unfettered right to serve all customers in their singly certificated service territories, telecommunications providers face high competition in many areas they serve that could be profitable, while they assume high-cost regulatory obligations to serve in areas that are uneconomic. As stated above, TTA's analysis strongly indicates that any company-specific determination of a reasonable rate of return for a small provider in any base rate case—which the Commission retains the authority to initiate, and in which the FCC benchmark would not apply—would likely be higher than the FCC's prescribed rate of return used for SB 586 purposes and would certainly be well above the 6.75% rate of return that serves as the floor for reasonable returns under SB 586.

Regarding TCA's criticism of the FCC's separations process, the comprehensive separations and allocations process small providers are subject to under FCC rules was amply addressed in Project No. 51433.[13] In particular, the Cost Allocation Manuals ("CAM") small providers file provide extensive transparency into their accounting procedures and specify how dollars flow through the FCC Part 64 allocation process (allocating non-regulated services out

[12] *See* Office of Public Utility Commission's Comments at 2. ("OPUC's Comments").

[13] *See Review of Telecommunications Providers Receiving Texas Universal Service Fund Support Under the Texas High Cost Universal Service Plan and Small and Rural Incumbent Local Exchange Company Universal Service Plan*, Project No. 51433.

from regulated services) and into the Part 36 separations process (separating interstate services out from intrastate services), which in combination illustrate how total amounts flow down to the reported intrastate, regulated amounts, and only such amounts affect a company's return and/or support under SB 586. The annual reports small providers are required to file each year under SB 586 also include additional information the Commission requested to provide added insight into their expenses, investments, revenues, and operations. As noted previously, these are the longest, most extensive annual reports the Commission receives from utilities in any of the three industries it regulates.

2. **The efficiency and frequency of adjustment proceedings conducted under PURA § 56.032(h) and § 56.032(i); *and***
3. **The frequency and efficiency of determinations made on reasonable and necessary expenses under PURA § 56.032(d)(4)?**

TTA's initial comments demonstrate that the process for determinations made regarding the reasonable and necessary expenses of small providers under SB 586 has proven to be efficient as compared to rate cases, and the annual reviews are appropriately frequent. In fact, to date, no commenter provides any contrary view.

In response to Question No. 2, DTS raises issues with the implementation of 16 TAC § 26.407(j)(3),[14] which addresses changes to per-line support for competitive ETPs commensurate with any changes to small provider ILEC support. DTS's complaint is irrelevant to the question asked and should be disregarded for purposes of assessing the efficacy and frequency of cases under 16 TAC §§ 26.407(h), and (j)(1)-(2). DTS proposes that the Commission cease processing adjustment cases for small providers until the Commission has implemented 16 TAC § 26.407(j)(3) for competitive providers.[15] TTA sympathizes with DTS and other similarly

[14] *See* Comments of DialToneServices, L.P. at 2–3 (Apr. 8, 2022). ("DTS's Comments").

[15] *See id.* at 3.

situated companies (including some of TTA's members affiliated companies), but the solution is not, as DTS recommends,[16] trading one failure to implement Commission rules for a new failure to execute Commission rules.[17] TTA supports DTS's desire to implement 16 TAC § 26.407(j)(3), but it is outside of the scope of the questions being examined in this project.

4. The effect of changes in technology on regulated revenue and support needs or determinations made under PURA § 56.032?

TTA's initial comments note that the SB 586 mechanism is appropriately flexible to allow for pertinent technology changes to be reported upon, reviewed, associated expenses considered by Commission Staff, and support to be adjusted accordingly if needed. Any technological changes made to the network are automatically reflected in the rate review process established by SB 586, where each provider reports annually the changes in costs and revenues for intrastate, regulated services by properly separating and allocating revenues and expenses using the FCC's extensive and evolving accounting standards. Thus, the Commission may be assured that the regulated investment and expense reported annually already reflect the impact of any technological advancements being employed by providers. No other commentor contradicts the ability of the SB 586 process to appropriately account for changes in technology.

5. Any other relevant information that commenters believe is necessary for inclusion in the report and is in the public interest?

Given the breadth of comments in response to Question No. 5, TTA's replies below are divided by issue and commentor.

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[16] *Id.*

[17] *See* DTS's Comments at 3; *See* Initial Comments of AMA Techtel Communications, at 1 (Apr. 8, 2022).

A. TUSF Policy (Response to TCA Comments)

TCA's initial responses seem to suggest a general opposition not only to SB 586, but also to the State of Texas' policy goal of ensuring that telecommunications and information services are accessible to all Texans at reasonably comparable prices to those charged in urban areas.[18] Support for rural services to rural Texans has already been drastically underfunded for more than 15 months, and this month was reduced to its lowest level ever. Even at a time when the PUCT is only paying out 15%[19] of the Commission-ordered high-cost support to small providers and other ETPs, TCA argues that that the PUCT should not contemplate rule changes or potential ways to increase TUSF support to ILECs, should avoid "mission creep," and should not propose to increase "subsidies" from TUSF.[20] Such recommendations run counter to Texas's explicit policy goals.

B. Transparency (Response to TCA Comments)

TCA also complains that SB 586 proceedings lack transparency because they are "largely confidential." It states the public and Legislature "need to have better knowledge about how the funds are being used," because "[o]ther than the small ILECs and the Commission Staff, no other stakeholders know the details necessary to render informed responses to these questions."[21]

TTA acknowledges that many components of the SB 586 process are confidential—necessarily, because the small providers who participate are in a competitive industry and cannot air such detailed and competitively sensitive information in a wholly public forum like the Commission's Interchange. However, TTA disagrees that the confidential nature of small provider financial data renders the SB 586 mechanism untransparent. The PUCT has access to all of the

[18] *See* PURA §§ 51.001(g); 56.021; and 56.023.

[19] Apr. 13, 2022 Solix Letter.

[20] *See* TCA's Comments at 5.

[21] *See* TCA's Comments at 4.

information submitted and has not noted as much as a single issue with all of the filings that they have reviewed.

The issue of confidential information was fully vetted in the PUCT rulemaking in 2018.[22] After extensive stakeholder feedback, the Commission agreed with the treatment of the confidential information suggested by TCA[23] and determined that the proper handling of confidential information in the SB 586 process would be that annual reports are confidential, as set out in the statute, but that parties in contested cases could access confidential materials consistent with other applicable administrative rules. This treatment is in keeping with a long history of existing precedent of resolving the issues of confidentiality and the availability of such information to parties having a justiciable interest. Neither TCA nor any other stakeholder has yet sought to participate in SB 586 adjustment proceedings. TCA cannot reasonably complain about not having visibility into a process in which it has chosen not to participate.

In addition, TCA's transparency arguments ignores what is public in this process. Cover pleadings and responses to "General Questions" required by the Commission are filed publicly in annual report proceedings.[24] In addition, pleadings and written testimony are filed publicly in adjustment proceedings, redacted only where certain financial data is included.[25] Commission Staff's recommendations in annual report projects are also public, although Commission Staff's

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[22] *Rulemaking to Add 16 Tex. Admin. Code 26.407 Small and Rural Incumbent Local Exchange Company Universal Service Plan (SRILEC USP) Support Adjustments Pursuant to SB 586*, Project No. 47669, Order Adopting New § 26.407 at 16–17 (Oct. 16, 2018).

[23] *Id.* at 17 ("TCA argued that, once a contested case arises, then the requirements of the Administrative Procedures Act must apply, including the provisions that relate to confidentiality of information."). *See also* 16 TAC § 26.407(i)(2).

[24]*See, e.g., 2020 Annual Report of Eastex Telephone Cooperative, Inc. Under 16 TAC § 26.407(e)*, Project No. 52555, 2020 Annual Report of Eastex Telephone Cooperative, Inc. at 1–13 (Sept. 13, 2021).

[25] *See, e.g., Application of Cumby Telephone Cooperative, Inc. to Adjust High Cost Support Under 16 TAC § 26.407(h)*, Docket No. 50699, Application of Cumby Telephone Cooperative, Inc. (Mar. 25, 2020).

supporting analysis of financial data may be confidential, and the Commission's orders in adjustment dockets are wholly public. In other words, the public is able to see what rates of return each small provider reports each year; when Commission Staff recommends adjusting them; what support adjustments small providers ask for, when, why, and what the Commission ultimately decides. Therefore, TTA believes the Legislature and the Commission have struck the correct balance between the small providers' need for confidentiality of competitively-sensitive financial data and the public's need for transparency.[26]

Finally, TCA's criticism appears to discount Commission Staff's role in reviewing data. An array of experts at the Commission have access to all the small provider's data, including confidential materials, and they examine the data exhaustively and fully analyze each small provider's expenses and operations. As noted in TTA's initial comments, Commission Staff has issued *thousands* of Requests for Information to small providers, and they make recommendations in each and every one of the hundreds of SB 586 proceedings that have been resolved to date. On behalf of Texas ratepayers, the Commission has more transparency and oversight regarding small provider operations than ever before due to SB 586.

C. Federal Funding Opportunities (Response to CTIA Comments)

CTIA argues that the PUCT should consider federal support/broadband funding when assessing the need for TUSF support and whether small ILECs are earning a reasonable rate of return. CTIA notes that certain federal funds are derived from general taxes instead of surcharges on telecommunications services, so such funds "achieve the goals of adoption and deployment without . . . suppressing demand for communications service."[27]

[26] The reports filed be small providers are confidential and not subject to disclosure under Chapter 552, Texas Government Code. *See* PURA § 56.032(k), 16 TAC § 26.407(i)(1).

[27] *See* Comments of CTIA at 2–4 (Apr. 8, 2022) (filed after the 3pm deadline) ("CTIA's Comments").

TTA responds that the existing SB 586 process already accomplishes the goals advocated by CTIA. Indeed, state and federal funding programs for supporting communications services are complimentary. If a small provider were to be awarded support from a capital investment grant program, those support dollars would automatically be reported and properly accounted for in the SB 586 reports filed with the PUCT annually. Plant investment made via federal grant programs would not be included in the regulated revenue requirement under existing SB 586 accounting procedures. If costs and revenues shift toward nonregulated or interstate functions, then the burden on the intrastate, regulated cost of service—the data used to identify TUSF support needs—would be reduced. Small providers will receive only what is needed to provide communications services to rural Texans. In other words, the process established by SB 586 already accomplishes CTIA's objective, and accomplishes it annually for each provider. TTA is unaware of any other process that may better address CTIA's goals than a rate of return mechanism such as SB 586.

Certainly, a wireless company may also provide service in rural Texas; many do. However, without TUSF or other means of adequate support to supplement the low revenues from local rates in sparsely populated, high-cost rural areas, then eventually customers across large portions of Texas will be left without wireline or wireless communications services, as both depend on the underlying wireline network being properly funded and well maintained.

In regard to CTIA's comments related to the Affordable Connectivity Program, those federal dollars merely offset consumer Broadband Internet Access Service retail rates, similar to how Texas Lifeline support offsets consumer rates for Basic Local Telecommunications Service. They are not additional revenues to providers, but merely offsets to regular revenues to assist qualifying low-income consumers. TTA appreciates any funding that makes telecommunications services more affordable to consumers, but these particular programs do not fund the rural network.

TTA shares CTIA's concern regarding the impact of high surcharges on telecommunications services. All industry participants and regulators should have this concern and look for ways to ensure that all who benefit from the telecommunications network pay a low, but fair share for its construction and operation. It is for this very reason that TTA has asked the Commission to modernize the TUSF assessment mechanism and impose TUSF surcharges in a competitively neutral way similar to how the Texas Commission on State Emergency Communications assesses 9-1-1 surcharges.[28]

III. CONCLUSION

TTA reiterates that SB 586 has worked well from a process perspective. The provisions of SB 586 were designed to ensure communications adequacy for all Texans while ensuring providers are not misusing TUSF support. Small providers have undergone additional regulatory scrutiny, but at the same time have received only a small fraction of the amounts of TUSF high-cost support that they are due since January 2021, largely frustrating the purpose of SB 586. This carefully crafted bill should have the opportunity to work, with actual funding, for several years as planned before the Commission or the Texas Legislature assesses any changes to its mechanisms, if needed.

Until such time, rural Texans should be provided continued access to affordable, reliable communications services resulting from a properly maintained, properly supported

[28] *Review of TUSF Rate*, Project No. 50796, Texas Telephone Association's Comments in Response to Commission Order Requesting Comments at 6-8 (May 29, 2020); *see also* 1 TAC § 255.4(a)

telecommunications network. Such a network requires both initial and ongoing investments, and investments in high-cost rural areas require enduring, predictable support.

TTA appreciates the opportunity to provide these reply comments and looks forward to working with Commission Staff and interested parties in this matter.

Respectfully submitted,

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